illegal search warrant entered the home and, after accusing her of concealing stolen property, conducted a vigorous and ransacking nighttime search of her home.

In conjunction with the search, the officers, without warning Mrs. Forsythe of her privilege against self-incrimination and her right to counsel, interrogated the distraught woman vigorously and at length, obtaining from her a number of exculpatory statements later used by the State at her trial in an effort to show guilty knowledge, a prime element of the crime of which she was accused.

This case arose from the January 22, 1966, burglary of a suburban Lima, Ohio, home during which a number of valuables, including a mink coat and two fur-trimmed sweaters, allegedly were stolen. Allen County Sheriff's Deputy John Winters, who led the February 21 search of Petitioner's home, conducted the investigation of this burglary.

Early in the afternoon of February 20, a day and a half prior to the search, Deputy Winters obtained information accusing the Petitioner of concealing in her home "a mink coat, mink stole and jewelry." The following evening, at 6:30 p.m. on the 21st of February, Deputy Winters went to the home of Lima Municipal Judge Roger Andrews and, on his affidavit that Mrs. Forsythe was committing the offense of concealing stolen property, obtained a warrant to conduct a night-time search on the grounds of its "urgent necessity."

Arriving at Petitioner's home at 8:15 p.m. that night, Deputy Winters and the five (5) other officers first read to her the search warrant which accused her of concealing the mink coat and other items. Then, without first advising her of her privilege against self-incrimination and her right to counsel, the officers proceeded to question her

and even threatened to damage her property by breaking down locked doors if she refused to yield up the stolen property. During this initial confrontation, the Petitioner is alleged to have made an exculpatory statement to the effect she "had no fur coats."

The officers then proceeded to search the house in a ransacking manner, two of them searching the basement, two the first floor and two the second floor, demanding all the while that the Petitioner produce keys for locked closet doors they found in the course of their search. At one point Petitioner was unable to readily find the key to her bedroom closet door, in which items allegedly taken in the January 22 burglary ultimately were found. She allegedly told the officers she did not know where the missing key was, but later found the key and gave it to them after the officers threatened to break down the closet door.

When this closet was finally opened and the alleged stolen goods found, Petitioner found herself in her own bedroom, surrounded by a hostile crowd of questioning officers and strangers. After the search had begun, the six officers were joined by one other, and by three civilian strangers called to the home by the searchers. Alone in her bedroom with this group, Petitioner was interrogated at length. At this time she was alleged to have made an exculpatory statement that a fur coat found in the closet was left at her home by a former roomer, a Barbara Brown, who had left for Florida in December, 1965. The burglary was alleged not to have taken place until January, 1966.

The testimony allowed in evidence at trial about Petitioner's exculpatory statements concerning her initial denial that she had stolen items in her home, that she did not have a key to the closet, and that the coat was left there prior to the burglary, were stressed by the Prosecu-

tor in his opening statement and again in his final arguments in an effort to show Petitioner's guilty knowledge.

The search and interrogation lasted approximately two hours. Mrs. Forsythe was then taken to the Lima Police headquarters where she was "booked" for concealing stolen property and then held overnight in the city jail.

The Petitioner first raised the federal question of the denial of her privilege against self-incrimination prior to her trial when, on July 8, 1966, she filed a written motion with the trial court (The Court of Common Pleas of Allen County, Ohio):

> "* * * for an order to suppress any and all evidence against her that might be in the form of written or oral statements made by the defendant immediately before, at the time of, and following her arrest on this charge, for the reason that her constitutional rights were violated in that:
>
> 1. She was not informed of her right to remain silent.
> 2. She was not told that anything she might say could be used against her in court.
> 3. She was not told that she had a right to have an attorney with her before any questioning.
> 4. She was not told that if she wanted an attorney but could not afford one, an attorney would be provided for her free.
> 5. She was not given the opportunity to knowingly and intelligently choose to make or not to make a statement."

On July 18, 1966, the day before Petitioner's trial commenced, trial Judge John H. Davison, following a hearing on Petitioner's motion, held that "any statements and answers to questions of officers given by defendant after being taken in custody on the charge *at the close of*

the search are not admissible in evidence. Statements and answers given before being taken into custody on this charge during search conducted by warrant in investigating a former burglary are admissible * * *." (Emphasis added.)

After trial commenced July 19, 1966, Petitioner again raised the question of infringement of her constitutional privilege against self-incrimination by orally moving to suppress, following the Prosecutor's opening statement, all statements obtained from her during the search. This motion was made in conjunction with Petitioner's motion for a directed verdict based on the inadequacy of the Prosecutor's opening statement. The motions, arguments and court findings are set out in pages 143 to 154 of the Bill of Exceptions. In summary, the Court overruled Petitioner's motion and permitted the Prosecutor to amend his opening statement.

From that point forward in the trial Petitioner objected repeatedly to testimony by State's witness Winters as to statements obtained from her during the search—and was repeatedly overruled.

Ohio's Revised Code, Section 2933.24, following the common law, strictly limits night searches to occasions of "urgent necessity." In pertinent part, the statute reads:

> "* * * the command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search at night in which case a search in the night may be ordered * * *."

Petitioner, however, was unaware that the warrant was illegal and the search unlawful until the Prosecuting Attorney first produced the evidence during the course of the trial.

Petitioner first raised this federal question by means of a general objection when the State sought to introduce

into evidence the items found in her home by the officers. Her objection was overruled and the items admitted, after argument off the record. The gist of the argument by the Prosecutor and the ruling by the Court was, however, that under Ohio's procedural rules the Petitioner had waived her right to have illegally-seized evidence suppressed by failing to make a motion to suppress prior to trial. (Bill of Exceptions, pages 192-93.)

After this, the State's second and final witness, Deputy Winters, took the stand and the following colloquies with Petitioner's counsel, Mr. DaPore, brought out the facts rendering the warrant invalid and the search unreasonable:

> "Q. You first found out something about this case —when was the first time you found out anything about this case?
>
> A. February 20." (Bill of Exceptions, page 222.)

* * * * *

> "Q. What other information did you have in your possession from June (sic) 20 until the night of February 21?
>
> A. I don't quite understand your question. Pertaining to what?
>
> Q. Pertaining to these items that we are talking about here. What additional information did you gather that you didn't get from Nancy Kitchens?
>
> A. That is the only information we had, just what the Kitchens girl told us." (Bill of Exceptions, page 223.)

* * * * *

> "Q. You went out to the Judge's residence. Was there any reason you couldn't have gone to the Judge's residence on the afternoon of the 20th when you found this information out or gone to the Court?
>
> A. I can't recall. I am sorry.

Q. Well, certainly there must have been some logical explanation for getting a Judge out of the privacy of his home at night when you found out the information a day and a half earlier in the afternoon.

A. Well, I can recall that we were very busy at that time.

Q. It was a little inconvenient for you to go out in the afternoon, is that right?

A. No, sir. We had other investigations we were working on at the present time.

Q. But, you weren't worried about the coat or the sweaters disappearing that day and a half from June Forsythe's residence? It wasn't an emergency search was it, if you waited a day and a half?

A. No, sir.

Q. And you went out there at night time instead of day time, is that right?

A. Yes, sir." (Bill of Exceptions, pages 223-24.)

Petitioner then raised the question by motion in the following manner, after she rested without testifying or offering evidence in her behalf:

"The Court: Defendant having rested their case, there is no rebuttal. Are you ready for argument, gentlemen?

Mr. DaPore: (Counsel for Petitioner): We have a preliminary motion that I think can be taken care of at the bench. By reason of all the evidence we would like to make a motion for a directed verdict after all the evidence has been presented and we would like to make a motion to suppress all evidence of oral statements and physical evidence obtained by a search warrant and renew the previous motion.

The Court: Overruled. Now gentlemen, are you ready for argument?" (Bill of Exceptions, pages 255-56.)

In their arguments to the jury, Petitioner's counsel called the jury's attention to the State's failure to call the

other officers who took part in the search, or the persons who informed the police that Petitioner allegedly concealed stolen goods, or the man then in prison who allegedly sold the stolen valuables to the Petitioner, or the woman Petitioner is alleged to have said left the fur coat at her home.

This prompted the Prosecutor in his final argument to comment to the jury on Petitioner's failure to call these witnesses on her behalf, clearly implying to a jury of laymen that if they could have helped her they would have been called by Petitioner and that since they were not called then logically they must have been such as would have harmed her. Thus, the Prosecutor shifted the burden of proof to the Petitioner to prove her innocence.

Examples of these comments are the following by the Prosecutor:

> "Now, unless Mr. DaPore is suggesting that there is some reason not to believe Deputy Winters, then I don't see any reason why we should bring in everyone else that participated in the search. We have the fellow who was there where it happened. Now, if you folks see a reason for that, then I am not aware of that and again all I can do is fall back on my original statement that he could have brought them in just as easily as I could have with the same subpoena." (Bill of Exceptions, pages 306-07.)

and:

> "Now, I would believe in Santa Clause (sic) long before I would believe something like that. Mr. DaPore or Mrs. Evans (counsel for Petitioner) could have called in anyone of these witnesses, but there is no way in the world that the Prosecutor could have ever brought in Barbara Brown, if there is or ever was a Barbara Brown. The only people that could have produced her in this case are counsel for the defendant, and the defendant himself, if there is such a person." (Bill of Exceptions, pages 309-10.)

Petitioner was found guilty by the jury on July 20, 1966. A motion for a new trial, made August 18, 1966, was overruled by the trial court.

Petitioner next raised the federal questions of the violations of her privilege against self-incrimination and unreasonable search and seizure in her unsuccessful appeals to the Allen County Court of Appeals of the Third Judicial District of Ohio and in the Ohio Supreme Court. In these appellate courts the Petitioner also raised the federal question of the violation of her privilege against self-incrimination by the Prosecutor's improper remarks to the jury concerning her failure to call any witnesses on her behalf.

The Assignments of Error to the Court of Appeals were in the following form:

> "1. The court permitted the State of Ohio to present to the jury evidence that was illegally seized from the home of the defendant.
>
> 2. The court permitted the State of Ohio to present testimony by the arresting officer of statements made by the defendant while she was in custody and before she was warned of her constitutional right to remain silent, or her right to counsel.
>
> 3. The prosecuting attorney committed acts of misconduct during his argument prejudicial to the defendant's constitutional rights by commenting upon the defendant's failure to put upon the stand witnesses that were equally available to both the State and the defendant."

The Questions of Law presented to the Ohio Supreme Court were in the following form:

First Question of Law:

> "Whether the questioning of the defendant during the course of a search involving eight law enforcement officers at night when defendant was alone, constituted a deprivation 'of her freedom of action in any

significant way,' requiring the exercise of the procedural safeguards as established by the Miranda decision?"

Second Question of Law:

"Was the admission of items obtained in an illegal search and seizure prejudicial to the rights of the accused where a motion to suppress was not made prior to trial but was made during the trial when the defendant first learned that the search was illegal? Is a pre-trial motion to suppress illegally obtained evidence always necessary?"

Third Question of Law:

"Did the prosecuting attorney prejudice the accused's right of presumption of innocence and shift the burden of proof by commenting in his final argument to the jury upon the defendant's failure to produce witnesses to prove her innocence?"

The Court of Appeals affirmed the conviction without opinion on February 24, 1967, although noting in its journal entry that reasonable grounds existed for the appeal.

The Ohio Supreme Court by a four to three vote on September 27, 1967, dismissed Petitioner's appeal without opinion on the grounds that no substantial constitutional question exists, issued its mandate and dismissed her motion for leave to appeal. Petitioner's motion for rehearing was denied by the Ohio Supreme Court without opinion on October 25, 1967.

Petitioner filed her Notice of Appeal to the United States Supreme Court with the Ohio Supreme Court on January 12, 1968. On November 19, 1967, this Court, by Mr. Justice Potter Stewart, granted Petitioner stay of execution pending her timely filing of this petition for writ of certiorari.

WHY WRIT SHOULD BE GRANTED.

Three clear-cut factual situations are presented in Petitioner's case. If reviewed by this Court, they could serve to clarify the scope of this Court's previous ruling in the area of self-incrimination and resolve the still-prevalent misapprehension by state courts and police that somehow form and procedure is an adequate substitute for the substance of those basic rights accruing to the individual via the 14th Amendment.

> Can a state court permit illegally-seized evidence to be used against a defendant simply because the defendant did not know until too late that the evidence was tainted?
>
> Can six or seven police officers, merely by questioning a suspect in her home and delaying their "arrest" until they have elicited incriminating statements, evade the "in custody" deadline for admonishment laid down by this court in its decision in *Miranda vs. Arizona,* 384 U. S. 436?
>
> If a defendant is protected from prejudicial comment about his failure to testify at trial, should he not also be protected against comment upon his failure to have others testify for him?

The Fourth Amendment safeguard against unreasonable search and seizure is applicable to the States by the 14th Amendment. *Mapp vs. Ohio,* 367 U. S. 643, *Ker vs. California,* 374 U. S. 23, and the standards of unreasonableness are the same under the Fourth and 14th Amendments, *Aguilar vs. Texas,* 378 U. S. 108, *Ker vs. California, supra.* This Court in *Sgro vs. United States,* 287 U. S. 206, characterized the search warrant as a drastic proceeding and said legislation regulating it should be liberally construed in favor of the individual. In *Johnson vs. United States,* 333 U. S. 10, this Court held that even though the searching officers smelled opium through the suspect's

door and had ample probable cause to suspect a felony was being committed, their search without warrant was illegal because they had been told by a reliable informant of the crime an hour beforehand and had ample time to get a warrant.

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to the magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." *Johnson vs. United States, supra.*

The situation in Petitioner's case is that of officers who had their probable cause on February 20, but for their convenience—and presumably for the psychological advantage it would give them over her—they waited until the following night before getting a warrant authorizing a night-time search. This, Petitioner contends, was even more reprehensible than the actions of the police in *Johnson,* and it rendered any evidence they obtained by this illegal warrant subject to suppression.

The knowledge of the delay in seeking the warrant, however, was in the sole possession of the searchers until after trial commenced. At that point the Petitioner, attempting to exercise the exclusionary rule provided her by *Mapp,* ran afoul of the Ohio procedural rule that, as interpreted by the trial court, she had waived her right to suppress the tainted evidence by failing to make a pretrial motion. *Ciano vs. State,* 105 O. S. 229, 137 N. E. 11.

Such procedural defaults in federal courts do not deprive the defendant of his constitutional safeguards. *Amos vs. United States,* 255 U. S. 313, *Gouled vs. United States,* 225 U. S. 298. But in *Henry vs. Mississippi,* 379 U. S. 443, this Court held that a litigant's procedural defaults in a

state court do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate interest. In the *Henry* case this Court, by vacating judgment in favor of a hearing to determine if the defendant knowingly waived his federal claim by not making timely objection, did not come to grips with the issue of primacy of substantive federal rights over state procedural rights, which it could do on the factual issue presented here.

It is undisputed in Petitioner's case that she was never warned of her rights to silence and to counsel. The dispute is centered on the point in time and circumstance when she should have been warned—that is, when the officers entered her home, or when they finally took her to the station and formally booked her for the crime.

In *Escobedo vs. Illinois*, 378 U. S. 478, this Court held that the suspect must be admonished at that point when the inquiry ceases to be general and starts to focus on a particular suspect. In *Miranda, supra*, this Court sought to clarify for the police this focus rule by holding that the admonishment must come at that point when the suspect is taken into custody or "otherwise deprived of his freedom in any significant way." Petitioner believes that by qualifying the "in custody" requirement with a broad statement concerning any significant deprivation of a suspect's freedom of action, this Court meant to warn police that they cannot circumvent the *Escobedo* rule by artful dodges and semantics; that the suspect need not be in handcuffs, or in a police station, or even a police car to be "in custody"; that invading a lone woman's house in force, subjecting her to the coercion of fear and apprehension such as a visit of raid proportions carries with it, and mutely warning her by their presence that she cannot leave but must stay in her own home and answer their

persistent questions, may not be "in custody" as police view it, but is certainly a significant deprivation of freedom that brings her within the procedural safeguards of the Fifth, Sixth and 14th Amendments.

The third factual issue presented here is the comment by the prosecutor upon Petitioner's failure to present witnesses in her behalf. This Court, in *Griffin vs. California,* 380 U. S. 609, held that the Fifth Amendment, as it bears on the States by reason of the 14th Amendment, forbids comment by the prosecution on the accused's silence. This guarantee against being compelled to testify against oneself was characterized in *In Re Gault,* 387 U. S. 1, at page 50, as "* * *—a command which this court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom."

Comment upon a defendant's failure to testify amounts to a tender of evidence of his failure to deny the accusation and creates a presumption of guilt which casts the burden of proof upon the defendant. As this Court said in *Griffin,* page 614, it penalizes the accused for asserting the privilege.

Petitioner contends that the same sort of comment by the Prosecutor to the jury, only this time aimed at the accused's failure to have others testify for him, renders the prohibition of *Griffin* meaningless by solemnizing the accused's failure to come forward with proof into evidence against him as surely as does comment upon his failure to speak out for himself.

For these reasons Petitioner urges that the writ be granted.

Respectfully submitted,

JOSEPH C. DAPORE,
Attorney for Petitioner.

Of Counsel:

NAVARRE, RIZOR, DAPORE & PETTIT,
WILLIAM D. PEPPLER.

APPENDIX A.

Orders in the Supreme of Ohio.

No. 40914.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Plaintiff-Appellee,
vs.
PAULINE JUNE FORSYTHE,
Defendant-Appellant.

ORDER ON MOTION FOR LEAVE TO APPEAL.

(Entered September 27, 1967.)

It is ordered by the Court that this motion is overruled.

MANDATE.

(Entered September 27, 1967.)

To the Honorable Common Pleas Court within and for the County of Allen, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

Order on Rehearing.

(Entered October 25, 1967.)

It is ordered by the court that rehearing in this case is denied.